
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and A.
EUGENE WAYLAND,

Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF WASHING-
TON, NORTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

FRANCIS A. GARRECHT,
*United States Attorney,
Eastern District of Washington.*

AN EXPLANATION.

In view of the possibilities under Rule 24, it was deemed imprudent at this distance from the office of the Clerk to delay the preparation of the brief of defendant in error until that of plaintiff in error had been served. Accordingly, this brief was in print prior to the service of the brief of plaintiff in error. Herein the Assignments of Error as printed in the Transcript are followed, which differ from the Assignments in the brief of plaintiff in error. The Court is requested to note the appended memorandum, which attempts to harmonize the apparent discrepancy.

Assignments according to brief of Plain- tiff in Error.	Assignments of Error according to Transcript and herein
I. ----- Same as -----	1 and 2
II. ----- Same as -----	3
III. ----- Same as -----	4
IV. ----- New, not assigned as error----	
V. ----- Similar to -----	10
VI. ----- Similar to -----	7, 8, 9, 11, 13, 14
VII. ----- Same as -----	20
VIII.----- Answered under 3, same as--	24
IX. ----- Same as -----	23
X. ----- New, not assigned as error----	
XI. and XII. Same as -----	28, 29, 30, 31, 32
XIII. ----- New, not assigned as error----	
XIV. ----- Same as -----	33
XV. ----- Same as -----	34
XVI. ----- Same as -----	35-36
XVII. ----- Same as -----	38
XVIII. ----- Same as -----	39-40
XIX. ----- Same as -----	41-43
XX., XXI.,	
XXII. ---- New, not assigned as error----	

The Argument on the other assignments fully cover those designated herein as new.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUSSELL G. BELDEN and A.	}
EUGENE WAYLAND,	
<i>Plaintiffs in Error,</i>	
vs.	
UNITED STATES OF AMERICA,	}
<i>Defendant in Error.</i>	

STATEMENT OF THE CASE.

The defendants, R. G. Belden and A. E. Wayland, were convicted of the use or misuse of the United States mail and Post-office establishment of the Government in furtherance of schemes and artifices to defraud certain persons and the public generally. One of the defendants, R. G. Belden, has prosecuted his appeal. The facts are substantially as follows:

Before or while engaged in organizing the various coal mining companies as hereafter explained, defendants had persuaded themselves, as expressed in a letter which was offered in evidence *that the public was anxious to invest in coal*. (Transcript p. 394, Plffs. Ex. No. 121.)

In 1905 these defendants and another owned the R. G. Belden Company, a corporation, which company had an option on sixteen locations in the Kootenai District, B. C. In April of that year defendants organized the *International Development Company*, another corporation capitalized on paper for \$30,000, and the R. G. Belden Company subscribed for the entire capital stock of \$30,000; and, in full payment thereof, transferred to the International Development Company the option held by the R. G. Belden Company on the sixteen coal locations before mentioned. (Transcript, pp. 314, 72, 358, 360, 73, 263, 264, 77.)

Later in the same year these coal locations were abandoned. Defendant Belden and one Batiste Lamereaux then staked four other coal claims on the Michel Creek several miles north of Crows Nest, which were afterwards located, two in the names of C. L. Butterfield and J. T. Penn and the other two in the names of Ellen LeFranze and Elizabeth Martin. (Transcript, pp. 263, 264, 360, 361.)

The defendants then caused to be organized another corporation, the Michel Coal Mines, Limited, with 1,500,000 shares of stock at the par value of \$1.00. The defendants then, acting through the International Development Company, transferred the two

claims staked in the names of Butterfield and Penn for the entire 1,500,000 shares of the company's stock, but returned 500,000 shares to the company for treasury stock, keeping the other 1,000,000 shares as individual, personal or promoter's stock. (Transcript pp. 75, 76, 359; Ex. 4, p. 360; pp. 166, 167, 169.)

Then a partnership with one S. W. O'Brien was formed under the firm name of The Inland Surety Company, which company was to act as the fiscal agents for the Michel and to receive 20% commission on sales of treasury stock. O'Brien was to do the printing for the company, that is, the International Development Company, the pamphlets and prospectuses of which contained glowing indorsements of the Michel property and were distributed through the mail by the co-partnership, the Inland Surety Company. (Transcript pp. 366; Ex. No. 23, pp. 77, 360, 361, 82, 83, 84; Ex. No. 31, p. 366, 367, 139.)

Thereafter the Michel Company bought the two remaining claims which had been staked by Belden and located in the names of Miss LeFranze and Miss Martin for \$2500.00 in cash and 50,000 shares of treasury stock. The International Development Company, owned by these defendants, received all of this money and 40,000 shares of this stock, the other 10,000 shares being divided between the two women who had permitted the use of their names without any knowledge of the purpose. (Transcript, pp. 362; Plff. Exs. 11, 12, 14, p. 372; Ex. 47, p. 80.)

Defendants, about January, 1906, began selling the stock of this company. During 1906, 1907 and

1908, some work was done on the claims, 450 feet of tunnel was excavated, but without locating coal. Work was then discontinued. Nevertheless, an article was printed in the Spokane Chronicle containing the statement that a twenty-foot vein of coal had been discovered, purported clippings of which statement were circulated through the mails by defendants, when no twenty-foot vein of coal had been discovered, and at no time was any kind of merchantable coal found on the Michel. As stated, no work was done after 1908, but defendants sold stock in this alleged coal mine to the amount of 963,532 shares of the individual stock, receiving therefor \$85,399.24. (Transcript pp. 86, 87, 137, 138, 141, 143, 296; Ex. No. 243, p. 419; Ex. 76, pp. 381, 382; Ex. 80, pp. 382, 275.)

To go back again to 1906, J. H. Hemphill, at that time a member of the International Development Company, staked ten additional locations on Crown Mountain, on vacant ground adjoining the Michel. These claims were located in the names of defendants and of friends and relations, but were owned by the International Development Company, which company, the Court should always keep in mind, was the organization owned and controlled by the defendants and through which they manipulated all the other companies and corporations. (p. 144; Ex. 89 to 99, p. 384; Ex. 103, p. 385.)

To take over these ten claims on Crown mountain these defendants conceived another corporation which was to consist of 2,000,000 shares. But to enable them to get some cash without the necesisty of wait-

ing for the sale of shares of stock in the corporation to be organized in the future, they first formulated a syndicate, divided into twenty units, for the purpose of subscribing \$30,000, \$21,000 of which, with 100,000 shares of stock, defendants represented were to go to the owners of the claims and \$9000.00 to the International Development Company, and in fact all of the proceeds went to the International Development Company. Each unit was to produce \$1500.00. In return there would be distributed to each unit 50,000 shares in the contemplated company, and a prorata interest in 150,000 shares. Ten of the units were taken by outside parties and ten by the International Development Company. (Pp. 144, 146, 384, 385, 394; Ex. 47, Ex. 54, Ex. 108, p. 386, 387, 388.)

Thereupon the defendants organized the Crown Coal and Coke Company in September, 1906, with 2,000,000 shares of stock, par value \$1.00. The International Development Company then turned over to the corporation the ten coal locations as the purchase price of all the stock, of which 750,000 shares were returned for treasury stock. The remaining 1,250,000 shares were divided according to the syndicate agreement whereby the Internatioal Development Company received \$15,000 in cash and 575,000 shares of the stock. (Ex. 103; Transcript, p. 385; Exs. 89 to 99, p. 384; Ex. 47, p. 372.)

Subsequent development proved the Crown property did contain valuable coal deposits, but even these were exaggerated, and, as alleged in the indictment and as appeared in the proof, the excellent showing

made on the Crown was used to effectuate the sale of stock in the worthless mines. Some of the letters written by defendant R. G. Belden, to the agents contained such suggestions as "use Crown stock as bait," and "sweetening with Crown." (Ex. 146, 147, p. 402; Ex. 148, pp. 402, 403; Ex. 237, p. 417; Ex. 236, p. 416; Ex. 107, p. 387; Ex. 31, p. 366; Ex. 118, 119, 120, p. 393; Ex. 147, p. 402, transcript 183.)

In February, 1908, defendants organized another corporation, the Crow's Nest & Northern Railway Company, capitalized for \$2,000,000, divided into 20,000 shares, at \$100. This was a British Columbia corporation, all the others being corporations of the State of Washington. By the Canadian law, \$100,000 of the stock had to be subscribed, and 10 per cent of this amount deposited in some bank in British Columbia before a legal meeting could be held. So these defendants, through their control of the Crown Coal & Coke Company, had this company subscribe for 1,000 shares of railroad stock, which amounted to the required \$100,000, in payment of which the Crown Coal & Coke Company put \$10,000 in cash in a British Columbia bank; and, for the other \$90,000, gave the railroad company an exclusive right of way over land it did not own. (Ex. 102, p. 385; Ex. 54, p. 372; Ex. 104, p. 386; Ex. 105, p. 386; Ex. 106, p. 387; Ex. 125, pp. 396, 397.)

Further, these defendants caused the railroad company to exchange 2,000 shares of its stock, par value \$200,000, for 150,000 shares of Crown stock, par value \$150,000, which was not only a loss to the railroad

company on the face of the transaction, but gave the Crown Coal & Coke Company control of the railroad company. (Ex. 125, p. 396; Ex. 126, p. 397; Ex. 127, p. 398.)

Later two more claims were staked in the names of Ada J. Giles and Alice Cope, acquaintances of defendants. These are east of the Crown property and upon them no coal indications were ever found. The defendants again arranged a semi-syndicate as before outlined to raise \$40,000, ostensibly to buy these two claims which they already owned. They disposed of about 700,000 shares in the prospective company at 4c, and the \$28,000 so realized went to the defendants through their corporation, the International Development Company. The two women received 500 shares of Mill's Syndicate stock for the use of their names. (Transcript, pp. 192, 193; Ex. 144, p. 401; Ex. 145, p. 401; Ex. 142, p. 401.)

Thereupon, March, 1909, the defendants organized another corporation, the Empire Coal Company, with 1,500,000 shares at par value of \$1.00. Defendants then turned over the two claims to the company for its entire capital stock, retained 1,000,000 shares for themselves, and returned 500,000 shares as treasury stock. (Ex. 141, p. 401.)

A combination stock sale, supposedly to assist the railroad company, was then begun. The offer now being that with every \$500.00 stock sale of the Empire one share of railroad stock was to be given as a bonus. The arrangements being that of every \$500.00 received, \$100.00 would go to the railroad company

treasury to pay for one of its shares of stock. On this plan defendants disposed of 97 shares of railroad stock; received therefor \$9,700.00, all of which was the individual, personal promoters' stock of the International Development Company, and the \$9,700 so received went to their company, which defendants owned, and not to the treasury of the railroad company. (Transcript, pp. 183, 186, 194, 201, 206, 239, 245.)

We have now outlined the organization of the five corporations named in the indictment, viz: the International Development Company, whose capital stock of \$30,000 was paid for with 16 coal locations later discarded; the Michel, capitalized for \$1,500,000, the four claims of which cost less than \$500.00; the Crown Coal & Coke Company, capitalized for \$2,000,000, the ten locations costing about \$2500; the Crows Nest & Northern Railroad Company, capitalized for \$2,000,000, cost practically nothing; the Empire Coal & Coke Company, capitalized for \$1,500,000, costing not to exceed \$500; aggregating in all a capital stock on paper of over \$7,000,000, costing less than \$5,000.

Defendants, during all of these times, by various schemes and devices, were controlling, directing and managing these corporations and engaging in stock sales, securing money through false representations of facts, and in furtherance of their artifices to defraud, made use of the mails and the post-office establishment of the United States. (Transcript, pp. 185, 224; Ex. 108, p. 388; Ex. 109, p. 389; Ex. 112, p. 393; Ex. 123,

p. 395; Ex. 124, p. 396; Ex. 185, p. 410; Ex. 186, p. 410; Ex. 230, p. 414; Ex. 150, p. 404; Ex. 157, p. 404, 405, 406, 407; Ex. 175, p. 408; Ex. 177, p. 409; Ex. 227, p. 413; Ex. 228, p. 413; Ex. 229, p. 414; Ex. 239, p. 418; Ex. 241, p. 418.)

To particularize briefly, it was charged and proven, that defendants represented that all the stocks of these various coal companies were valuable and would increase in value and would soon pay dividends, while they were never of value for coal, except the Crown, and none ever paid any dividends. (Transcript, pp. 229, 230, 233, 250, 251.)

They made representations that they were selling treasury stock of these companies and the proceeds were to be used to improve the property, when in fact they were disposing of their own, individual, and promoters' stocks. (Transcript. pp. 201, 206, 217, 221, 227, 228, 231, 232, 234, 240, 249, 254, 255, 256, 322. Ex. 32, pp. 367, 368, 369, 370, 123, 136, 164, 166, 177, 180.)

They procured resolutions to be passed by the various corporations designating their personal company, the International Development Company, as the fiscal agent for all the companies. (Transcript, p. 115. Ex. 143, p. 401; Exs. 8 and 9, pp. 361, 270, 173.)

They had passed a resolution by the Crown Coal & Coke Company authorizing defendants, through the International Development Company, to vote the stock owned by the Crown in the Crows Nest & Northern Railroad Company, and a like resolution empowering them to vote the railroad stock in the Crown Com-

pany, thus controlling both corporations. (Ex. 138, p. 400; Ex. 139, p. 400; Ex. 140, p. 400.)

They represented the property of the Michel to be valuable for coal, when no coal veins had ever been disclosed. After having done considerable work without finding any coal veins, and after discontinuing work on this claim in 1908, they continued to sell stock, representing to purchasers that there were coal veins on the property. (Ex. 80, p. 382, 383; Ex. 76, p. 381; transcript, pp. 141, 142, 118, 119, 286, 287, 332.)

As to the railroad corporation, they represented that the rails had been purchased, which was not true; that the entire right-of-way had been secured, which also was not true. (Transcript, pp. 203, 209, 216, 217, 219, 237, 238. Ex. 147, p. 402; Ex. 150, p. 403; Ex. 225, p. 412.)

As to the Crown Coal & Coke Company, as said, it had valuable showings, but these were used to sell the worthless stock of the other companies. In the literature of the other corporations, promulgated and circulated by defendants, descriptions of the Crown Company appeared in such a way as to mislead any but a careful reader into believing that the glowing representations as to the Crown property applied equally to the other properties. (Transcript, 183, 207, 239, 252. Ex. 31, p. 366; Ex. 107, p. 387; Exs. 118, 119, 120, p. 393; Exs. 146, 147, p. 402; Ex. 157, p. 405; Ex. 242, p. 418, 419.)

These defendants went further to facilitate sales of the Empire stock and represented that there was a

contemplated consolidation between it and the Crown Company, and made like misrepresentations to dispose of the Michel Company stock, when in truth and in fact, as these defendants well knew, the shareholders of the Crown Coal & Coke Company never intended any such consolidation. (Ex. 69, p. 374, 375, 376, 377, 378. Ex. 70, p. 379.)

Defendants practiced other frauds and misrepresentations whereby their commisions on sales were increased. (Transcript, pp. 163, 164, 165.)

The campaign of stock selling conducted by these defendants, as the evidence shows, had the following results:

On the Michel, represented as having a twenty-foot coal vein, but in fact worthless as a coal property, the defendants sold of their own individual personal or promoters' stock, shares for which they received in money, real estate, notes and other property, \$85,399.24. (Ex. 80. p. 382; Ex. 76, p. 381; transcript, pp. 138, 173.)

Of the Empire, the acquisition of which defendants represented to have cost \$40,000, but for which they actually expended about \$500, had no value as a coal property, although they represented that it contained millions of tons of coal and timber rights worth its cost, which also was not true. (Transcript, pp. 185, 243, 245, 251. Ex. 146, p. 402; Ex. 107, p. 387. Transcript, pp. 152, 156, 143, 274, 251, 252, 253.) In this company defendants sold of their own individual personal or promoters' stock shares for which they received in money, real estate, notes and other prop-

erty, \$163,478.78. (Transcript, pp. 195, 197, 198, 200.)

They also sold and disposed of personal or promoters' stock in the Crows Nest & Northern Railroad Company, for which they received money, real estate, notes and other property to the amount of \$13,207, besides large amounts in the Crown property. (Transcript, p. 163.)

As a net result of the activities of these defendants for about seven and one-half years, this little close corporation, the International Development Company, owned and controlled and managed by the defendants, whose original stock of \$30,000 was paid for in full by the exchange of an option on sixteen coal locations which were afterwards discarded as worthless, shows by its books to have declared the following dividends:

January 2nd, 1911, dividends-----\$ 70,000

November 18, 1912, dividends----- 300,000

(Ex. 16, pp. 363, 364, 365.)

In addition, these defendants paid to themselves, from funds of the company, the salary of \$10,000 per year. (Transcript, pp. 175, 177.)

POINTS AND AUTHORITIES.

I.

Not a conspiracy, but the misuse of the mail in furtherance of a scheme to defraud is the gist of the offense:

Sec. 215 Criminal Code.

Gould v. U. S., 209 Fed., 730.

II.

It was not necessary to allege a conspiracy to commit the crime charged; indeed, it would have been improper to do so.

A scheme to defraud is a conspiracy in operation, and although the conspiracy as such, is not charged, evidence showing its existence is admissible to prove the scheme.

Marrin vs. U. S., 167 Fed. 951.
5 R. C. L., p. 1087, Sec. 36.

III.

Persons who induce others by false and fraudulent representations and pretenses to part with their property are guilty of devising a scheme or artifice to defraud within the meaning of the statute.

Wilson v. U. S., 190 Fed., 427.
U. S. v. Goldman, 207 Fed., 1002.
Gould v. U. S., 209 Fed., 730.

IV.

No error was committed in permitting the defendants to be tried together. Where the defendants combined to perform certain acts and the proof shows a general plan of co-operation and concerted action, together with a community interest in the fruits of their endeavors, then the acts, declarations or letters of each relating to the subject matter are admissible against both.

5 R. C. L., p. 1089, Sec. 39.
Wilson v. U. S., 190 Fed., 436.
Fitzpatrick v. U. S., 178 U. S., 313.
Wiborg v. U. S., 163 U. S., 633.
8 Cyc., 679.
1 R. C. L., p. 518, Sec. 60.

V.

The Government having shown that defendants represented that they were selling treasury stock, the proceeds of which were to improve and develop the properties, when in fact they were selling personal stock and pocketing the receipts; that they represented that the right-of-way for the railroad had been secured and the rails bought, which was not true; that the Michel and Empire claims were valuable for coal and that coal and coal veins had been found on the properties, all of which was not true; that the stock was valuable and would increase in value and soon pay dividends, while they were never valuable and never paid dividends; the evidence is sufficient to substantiate fraudulent representations.

Wilson v. U. S., 190 Fed., 434.

VI.

Having shown that the defendants used these false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the Government was not required to go further and demonstrate that there was no coal on the premises, and even if an expert gave it as his opinion that coal would be found, this was not proof of defendants' good faith; nor could it warrant them in making glittering and alluring promises of large returns on small investments, or employing the other false representations made use of by them in despoiling the public as they did.

U. S. v. Goldman, 207 Fed., 1002.
Wilson v. U. S., 190 Fed., 434.
Durland v. U. S., 161 U. S., 313
Brooks v. U. S., 146 Fed., 230.
Cooper v. Schlesinger, 111 U. S., 148.
U. S. v. Bradford, 148 Fed., 424.
Horn v. U. S., 182 Fed., 739.

VII.

The letters set out in the indictment need not show on their face that they were of a nature calculated to be effective in carrying out the alleged fraudulent scheme.

The letters were mailed in connection with the scheme, whether the same was fraudulent, or whether the letters were mailed for the purpose of assisting in its execution, were questions for the jury.

Gould v. U. S., 209 Fed., 735.
Durland v. U. S., 161 U. S., 315.
Lemon v. U. S., 164 Fed., 958.

VIII.

The Federal Courts of Appeals hold that an objection to evidence upon the ground that it was "incompetent, irrelevant and immaterial" is insufficient to warrant review.

District of Columbia v. Wordbury, 136 U. S., 627.
Davis v. U. S., 107 Fed., 757.
Patrick v. Graham, 132 U. S., 627.
Camden v. Doremus, 44 U. S., 515.
Am. C. & F. v. Brinkman, 146 Fed., 716.
Reilley v. U. S., 106 Fed., 905.
Baltimore & O. R. R. Co. v. Hellenenthal, 88 Fed., 119.
Western Union v. Burgers, 108 Fed., 30.
Steers v. U. S., 192 Fed., 1.

ARGUMENT.

ASSIGNMENTS OF ERROR 1 AND 2.

Defendant complains because conspiracy is not charged in the indictment. To have done so in express terms would have rendered the pleading liable to attack for charging more than one crime.

There are two distinct statutes, under either of which defendants might have been indicted.

Under Revised Statutes, Sec. 5440, a conspiracy to commit an offense against the United States, if followed by an overt act, is itself a crime.

Under Sec. 215 of the Criminal Code, the use of the mails to carry out a fraudulent scheme is also a crime.

In this case, defendants were not charged with a conspiracy to commit an offense, but with the use of the mails pursuant to a fraudulent scheme.

Thus, *the use of the mails* in furtherance of such scheme, is the gist of the offense. In other words, it is not the scheme or the conspiracy, but the use made of the mails, that is the material thing.

As was said in *Marrin v. United States*, 167 Fed., at page 955:

"A scheme to defraud being a conspiracy in effect, and the overt act, the carrying of it out by means of the mails being the substantial thing," it is not necessary to combine the two.

It is fundamental in every prosecution that the indictment inform the defendant of the offense which he is to meet and to have it so described and identified that he will be protected from having to defend against

it a second time. Thus it was incumbent upon the Government to clearly charge the misuse of the mails and at the same time do it in such a way that it would not be susceptible of a construction that the crime charged was conspiracy.

It is a general rule

"That upon the trial of an indictment for a crime, evidence is admissible to prove a conspiracy to commit the crime charged, *although the conspiracy is not charged in the indictment.*"

"This is not permitted for the purpose of allowing a conviction of a crime not charged, but to lay a foundation for the admission of evidence."

5 R. C. L., p. 1087, Sec. 36, and cases cited.

The only complaint in this connection here is that the defendants should have been tried separately, or that the evidence against one should not have been admitted as against the other.

That the indictment indicates that the defendants acted together, jointly scheming, manipulating and controlling these corporations, and jointly making sales by false representations and sharing the profits, is as clear as the proof of these facts was conclusive.

Indeed, this was referred to by the trial court at the very threshold of the case (transcript, p. 70), when, in answer to defendants' application for separate trials, the learned judge said:

"The *Government is evidently proceeding* upon the theory that each of these co-defendants aided and abetted the other, or that there was a conspiracy between them."

ASSIGNMENTS OF ERROR 3, 4 AND 5.

By these assignments, error is claimed in that the Court denied esparate trials to defendants and permitted the Government to show the acts and dealings of one defendant occurring in the absence of the other.

It clearly appears from the evidence throughout the trial that the defendants were acting together carrying out a common plan. There are signed letters showing a common enterprise and understanding, and connecting them with both the Inland Surety Company and International Development Company, through which their operations were largely conducted. (See transcript, Ex. 70, p. 379; Ex. 111, pp. 390, 392; Ex. 69, p. 374; Exs. 138-39-40, p. 400; Ex. 1, p. 358; Ex. 16, p. 363-4; Ex. 89, p. 384; Exs. 90 to 99, p. 384; Exs. 102, 103, p. 385; Ex. 104, p. 386; Ex. 105, p. 386-7; Ex. 125, p. 396. Also oral testimony of witnesses, and transcript, pp. 112, 114, 116, 117, 185, 202, 208, 210, 211, 219, 224, 238, 241, 249.)

"When a conspiracy is established, everything said, written, or done by either of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by every-one of them, and may be proved against each."

5 *R. C. L.*, p. 1089, Sec. 39.

Defendants contend that the jury should have been advised that the evidence against one defendant would not be proof against the other until the conspiracy was established. We concede this to be a correct statement of the law, but when defendant says

that this was not done, we challenge the assertion. The Court, in its instruction to the jury, said:

"But unless you find beyond a reasonable doubt that there was a conspiracy or that one of the defendants aided, abetted, counseled, commanded, induced or procured the commission of the crime by the other, each defendant is criminally responsible for his own acts and his own conduct, if guilty at all." (Transcript, p. 341.)

AS TO ASSIGNMENT OF ERROR 20.

The purpose of this letter, Exhibit 185, p. 218, as appears upon its face, was in furtherance of the scheme and plan of defendants to direct, control and manipulate the various corporations mentioned in the indictment. On the argument of the motion for a new trial, it was urged that this letter (Ex. 185) had been erroneously admitted because the signature of A. E. Wayland thereto appended had not been proven. The Court will observe that the objection (p. 218) is a most general one, and did not advise the trial court that there was any question as to the genuineness of the signature or that the objection was on that ground, and the ruling would, therefore, not be error.

Euquhart v. Cass, 60 Wash., 251.

Tacklenburg v. Everett R. L. & W. Co., 59 Wash., 389.

Bolster v. Stocks, 13 Wash., 462.

Kroenert v. Falk, 32 Wash., 181.

Earles v. Bigelow, 7 Wash., 858.

State v. Pittam, 32 Wash., 137.

Besides, the objection was not sufficiently explicit to constitute error. The Federal Courts of Appeal, and most of the state courts, hold that an objection to

evidence upon the ground that it was "incompetent, irrelevant and immaterial" is insufficient to warrant review.

District of Columbia v. Wordbury, 136 U. S., 627.

Davis v. U. S., 107 Fed., 757.

Patrick v. Graham, 132 U. S., 627.

Camden v. Doremus, 44 U. S., 515.

Am. C. & F. Co. v. Brinkman, 146 Fed., 716.

Reilley v. U. S., 106 Fed., 905.

Baltimore & O. R. R. Co. v. Hellenthal, 88 Fed., 119.

Western Union v. Burgers, 108 Fed., 30.

Steers v. U. S., 192 Fed., 1.

(*Mo.*) *St. v. Casleton*, 164 S. W., 492.

(*S. Dak.*) *St. v. Davers*, 143 N. W., 364.

(*Iowa*) *St. v. Wilson*, 141 N. W., 357.

Further, when defendant Weyland testified in his own behalf, he tacitly admitted the signature. (Transcript, p. 319. Compare Exs. 185 and 244.)

ASSIGNMENT OF ERROR 23.

The error suggested by this assignment is that the evidence fails to establish the crime charged.

A reading of the statement of this case, found at the opening of this brief, and an examination of the transcript at the pages there indicated, will effectually dispose of this claim of error.

VARIOUS ASSIGNMENTS OF ERROR.

Assignments of Error Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21 and 22 not only have no merit as the evidence complained of was competent and pertinent, but besides, as appears from the

Transcript of Record herein, said evidence was admitted without objection. See transcript, pp. 118, 122, 137, 138, 177, 194, 195, 139, 194, 194, 201, 206, 212, 213, 216, 217, 219 and 233.) Indeed the evidence protested by No. 9 of the Assignments of Error was introduced on cross-examination (transcript, p. 177), and the admission of Exhibit 31 assigned as error in No. 12, and of Exhibit 183 assigned as error in No. 18 were with defendants' consent affirmatively expressed. (Transcript, pp. 139, 213.)

As to Assignments of Error Nos. 37 and 42, no request for the Court to give any such instructions appears in the transcript or among the exceptions. (Pp. 344-350.)

A reading of the evidence and the instructions will show an extraordinary consideration on the part of the judge of the court below of every right of defendants, and the rulings and instructions on any controverted point were particularly favorable to them.

Assignments of Error Nos. 26 and 27 are but fragments torn from their context in the body of the instructions, but even in the mutilated form set forth, they still are correct statements of law.

Assignments of Error 25, 28, 29, 30, 31 and 32 refer to instructions given and objected to generally, not that they are incorrect statements of law, but because the law relating to conspiracy was not in issue. We submit that the instructions on this point were proper and correct, and at the time of the trial defendants requested that the jury be instructed

relative to the law of conspiracy as is shown by their requested instructions Nos. 8 and 12. (Transcript, pp. 345, 347.) Besides these instructions are particularly objected to on behalf of defendant A. E. Wayland, as to whom this appeal has been dismissed.

Assignments of Error Nos. 33, 34, 35, 36, 38, 39, 40, 41 and 43 are without merit.

These requested instructions were correctly refused. All issues were properly covered by the instructions that were given. These under consideration contained, in most instances, incorrect statements of the law, in the others erroneous statements of fact, and in nearly all of them a mixture of both error of law and fact. Sometimes, as appears so notably in Assignment No. 41 (transcript, p. 449), there is an inconsistency in the different part of the same request.

By Assignments of Error 33, 34 and 43, it is sought to have the Court instruct, in effect, that the jury should return a verdict of not guilty, unless they found beyond a reasonable doubt that both the Michel and Empire properties were worthless, and that the fact as to whether or not they were worthless depended upon the opinion of experts and that defendants could not be convicted on the opinion of an expert. On this point argument is made that the only basis of the fraud charged against defendants depended upon whether or not these were coal properties.

A careful reading of the indictment will show that the representations in relation to whether or not there was coal on these properties is only one of many

misrepresentations made by defendants. Besides, there were many distinct and particular representations made as to these claims, which were not true: For instance, the Michel was represented as having a twenty-foot vein of coal, when in fact no coal vein had ever been disclosed. The Empire was represented as containing millions of tons of coal, and that defendants believed it to be more valuable than the Crown property. (Ex. 80, p. 382, 383; Ex. 76, p. 381. Transcript, pp. 141, 142, 118, 119, 286, 287, 332. Ex. 146, p. 402; Ex. 107, p. 387. Transcript, pp. 185, 243, 245, 152, 156, 143, 274, 251, 252, 253.)

To show that the defendants did not believe these assertions, the Government expert, Mr. House, by careful tabulations made from the books of the defendants, showed that they disposed of practically all of their Empire stock, but retained their Crown stock.

According to this showing, defendants, on January 1, 1912, retained among their holdings of Crown stock 399,266 shares, but on the same date held only 50,500 shares of Empire stock. (Transcript, pp. 176-199.)

In this connection, as a conclusive proof that defendants themselves did not believe the representations they were making, that their Empire stock was more valuable than Crown stock, we call the Court's attention to a letter written from one defendant to the other (Exhibit No. 245, transcript, p. 421), which concludes with the following significant paragraph:

"Notwithstanding these problems and surmises, let us sell coal stock—Crown, Michel, or any other kind, but above all—Empire."

Further, it conclusively appears from the evidence that the defendants were not innocent lambs, misled by the opinion of experts; indeed, it would appear that the use of the experts was only an additional scheme to mislead such prospective purchasers as could not be misled by their own statements. They secured these properties in the year 1905, and during 1906 were engaged in stock-selling campaigns. The opinions of the experts, behind which they now seek to hide, were not given until July, 1907, yet among the Exhibits we find such letters as Exhibit 80, dated April 6, 1906, in which, speaking of the Michel, it is said:

"Found coal in almost every place. * * * I see enough to convince me that we could show any number of veins in this gulch. * * * I believe there is almost an unlimited amount of coal underlying this property."

AS TO ASSIGNMENTS OF ERROR 35, 36, 38, 39 AND 40.

These requested instructions relate to the letters set forth in the first and second counts of the indictment, and it is contended by defendants that in order to make the sending of a letter obnoxious to the law, it must bear upon its face some matter of a nature calculated to be effective in carrying out the scheme to defraud. This is not the law.

"It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the post-office letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffectual therefor."

Durland v. U. S., 161 U. S., 315.

Lemon v. U. S., 164 Fed., 958.

Gould v. U. S., 209 Fed., 735.

But taking the letters in connection with the rest of the evidence, it is too plain for argument that they were mailed in furtherance of, and in the attempt to carry out, the fraudulent scheme heretofore devised by defendants. The letter, Exhibit 185, to Walter J. Woods (transcript, p. 410), and the other letters like it which were sent out, show on the face, that they were sent in furtherance of the design and purpose of controlling the corporations, which is one of the allegations of the indictment conclusively established by proof.

As to the letter written to John Neiderer, Exhibit No. 183, the transcript does not show whether he received treasury stock of the corporation or personal stock of the defendant for his money. But in any event, by this letter he was induced to buy stock in the Empire, which defendants had represented to him to be valuable, but which was valueless, and if defendants did not receive all the benefit of the money by transferring to him their personal stock, they received the benefit of the commissions they were getting from selling it. In any event, they profited and Mr. Neiderer was defrauded of his money by defendants, through the instrumentality of this letter and as a result of their scheme to defraud.

IN CONCLUSION.

We think the evidence shows that the defendants deliberately entered into a scheme to take advantage of the public interest in a great commodity—coal. That they induced hundreds of men and women to part with thousands of dollars to purchase shares of stock which they knew to be practically worthless.

We also feel safe in saying that it was apparent from the testimony that defendant Belden was the master mind in their schemes to exploit the public. And we have the honor to respectfully submit that no error was committed in the trial of this case, that the conviction was right and the judgment should be affirmed.

FRANCIS A. GARRECHT,
United States Attorney.